ADVANCED ISSUES IN ASYLUM, WITHHOLDING, AND CAT
Wednesday, June14, 2017
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

AGENDA

This session will be held in the K.D. Rooney Training Center (Tower - 18th Floor)

This presentation will provide an overview of specific topics relating to refugee and asylum law. The goal of the presentation is to expand on and discuss some of the nuanced and in-depth issues that arise in reviewing asylum, withholding of removal, and protection under the Convention Against Torture ("CAT") claims at the appellate level. Specifically, the presentation will focus on the various standard of review issues that arise in asylum, withholding of removal, and CAT claims. It will further explore the complexities involved in assessing whether a government is unwilling or unable to protect an applicant upon return to his or her home country. The presentation will additionally examine the various issues that arise in determining whether an applicant has established a nexus to a protected ground under the refugee definition, with particular attention paid to the issue of whether a claimed fear of persecution is on account of membership in a particular social group. The presentation will also include an extended discussion of advanced issues relating to protection under CAT and the bars that apply to asylum, withholding, and CAT claims. Finally, the presenters will highlight recent Board of Immigration Appeals and federal circuit cases pertinent to assessing asylum, withholding of removal, and CAT claims.

LEARNING OBJECTIVES:

By the completion of this session, attendees should:

- Be able to identify the standard of review applicable to the various issues and elements arising in asylum, withholding of removal, and CAT claims;
- Be familiar with the nuances that arise when assessing whether a country is unwilling or unable to protect its citizens from harm;
- Be familiar with recent court trends and legal nuances relating to the issue of nexus to a protected ground, including those relating to whether a claimed fear of persecution is on account of membership in a particular social group;
- Understand the complex issues relating to CAT protection and the legal bars that apply to asylum, withholding of removal, and CAT claims; and
- Be aware of recent BIA and federal circuit court cases affecting all three forms of relief.

9:30 – 10:00 a.m. **Registration**

10:00 – 10:05 a.m. **Introduction**
Amanda Adams
Senior Legal Advisor
Board of Immigration Appeals
Executive Office for Immigration Review
U.S. Department of Justice

10:05 – 11:00 a.m. **Program Overview and Standard of Review Issues in Asylum, Withholding, and CAT Claims**
Speaker: Karen Hope
Attorney Advisor
Board of Immigration Appeals
Executive Office for Immigration Review
U.S. Department of Justice

FACULTY BIOGRAPHIES

CHARLES ADKINS-BLANCH is the Vice Chairman for the Board of Immigration Appeals. He was appointed by Attorney General Eric Holder in January 2013. Mr. Adkins-Blanch received a Bachelor of Arts degree in 1984 from Grinnell College and a Juris Doctorate in 1990 from the National Law Center, George Washington University. He served as a BIA member from 2008 until his appointment as Vice Chairman. From 2004 to 2008, he served as an immigration judge at the Headquarters Immigration Court and, from 1995 to 2004, Mr. Adkins-Blanch served in EOIR's Office of the General Counsel, as General Counsel from 2000 to 2004, as acting General Counsel from 1999 to 2000, and as an associate General Counsel from 1995 to 1999. From 1990 to 1995, he worked for the BIA as an attorney advisor entering on duty through the Attorney General's Honors Program. From 1989 to 1990, he clerked in private practice with the firm of Maggio & Kattar, specializing in immigration and nationality law. Mr. Adkins-Blanch is a member of the District of Columbia and Virginia State Bars.

ADVANCED ISSUES IN ASYLUM, WITHHOLDING OF REMOVAL, AND CONVENTION AGAINST TORTURE

Board of Immigration Appeals – June 2017

Powerpoint Sections:

- Review Asylum & W/H elements (Hypos)
- Advanced Discussion of Unwilling/ Unable
- Advanced Discussion of PSG & Nexus
- Advanced discussion of CAT (Hypos)
- Review of SOR for BIA Decisions

Review Elements Hypo 1

- R's parents were politically active with the gov't in Sierra Leone
- At age 16, R witnessed RUF rebels cut off brother's hands, kidnap sister, & kill mother
- R's father fled and R never saw him again

Review Elements Hypo 1

Facts = PP?

- Cumulative approach
- Witnessed violent acts by RUF to family members, including murder, while still a child
- Beatings not life-threatening but still painful (and numerous); ongoing infirmity
- Long detention
- Protected grounds

Review Elements Hypo 1

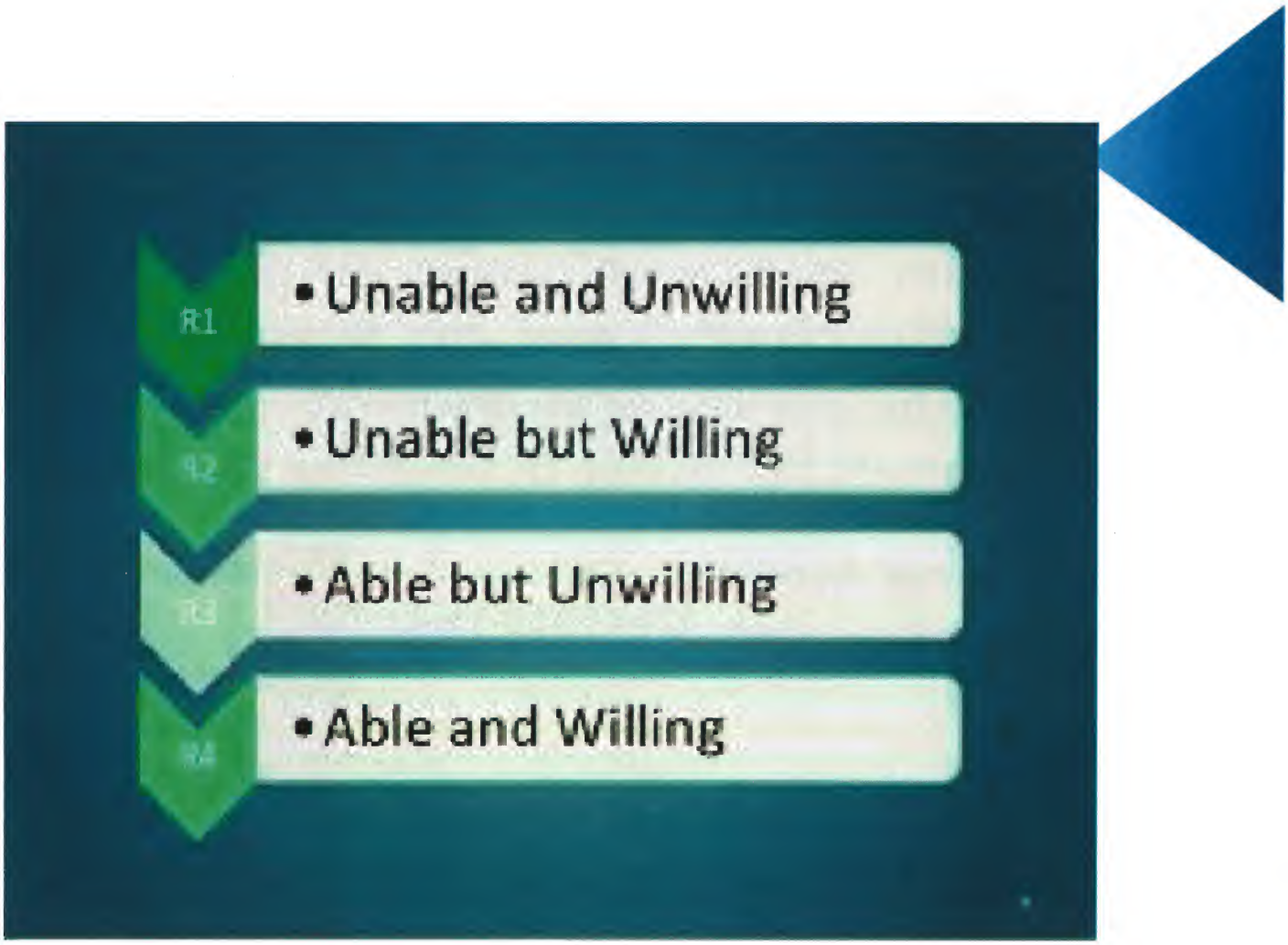
Assume presumption rebutted

- R credible
- R does not know what happened to father
- R has psychological issues
- R takes meds/unavailable in Sierra Leone
- High rate of FGM in Sierra Leone
- Daughter would return to Sierra Leone

What result?

Review Elements Hypo 2

- R claimed PP and fear of future persecution by Senegalese gov't.
- IJ found credible but no PP
- Fighting between gov't and MFDC continues
- WFF/Internal Relocation Issue


R1
• Unable and Unwilling
R2
• Unable but Willing
R3
• Able but Unwilling
R4
• Able and Willing

Common Examples of 3rd parties who inflict harm:

- Gangs
- Common criminals
- Militias or other non-regular armed forces
- Guerrillas or other rebel groups
- Violent religious or sectarian organizations
- Particularly powerful individuals

Circuit Court Guidance

Some decisions focus on government complicity with or condonation of private acts.

> *e.g.*, ***Barsoum v. Holder***, 617 F.3d 73 (1st Cir. 2010) ("The state must . . . be implicated, whether by participation or acquiescence, for harm to amount to persecution.")

Hypo #1 – Unable or Unwilling?

- R is a native of Indonesia and a Christian
- Attacked at age 16 by 10 students. Did not report.
- Attacked in college by men yelling religious slurs. Attackers fled when onlooker started yelling at them. Did not report.
- On two other instances, R was threatened or attacked on account of her religion. R did not report either attack, but one of the attacks was disrupted by a police siren that caused the assailants to flee the scene.

Unable to Control

To establish government's inability, the R "must show more than 'difficulty controlling' private behavior."

See ***De Castro-Gutierrez v. Holder***, 713 F.3d 375 (8th Cir. 2013)

- R provided evidence that rebels carried out violent acts in Colombia.
- But he did not show that the Colombian government condoned such violence or "demonstrated a complete helplessness to protect the victims."

Unable to Control?

The specific facts presented in each case will control. For example, compare two similar cases:

Khattak v. Holder, 704 F.3d 197, 206 (1st Cir. 2013) ("[While] military action indicates that the Pakistani government is willing to take on the Taliban, such action does not show that the . . . government is able to protect its citizens from Taliban attacks.").

Unwilling to Control

Unwillingness can be shown through corruption or inaction in the face of significant violence

See, e.g., ***Pan v. Holder***, 777 F.3d 540 (2d Cir. 2015)

- Native of Kyrgyz Republic, ethnic Korean, Evangelical Christian
- Did not report incidents of abuse to police, but . . .
- Testimony and objective evidence indicated police were corrupt and would not help.

Hypo #2 – Unable or Unwilling?

- R is a native of El Salvador. Gang members killed her husband's cousin. Later threatened to kill R if she reported them.
- One gang member prosecuted by Salvadoran gov't and sentenced to 25 years' imprisonment for unrelated incident.
- DOS report states corruption and gang influence are widespread problems in El Salvador.

Hypo #3 – Unable or Unwilling?

- R joined resistance group in Kuwait. Captured and tortured by Iraqi soldiers. Forced to reveal location of resistance hideout. Soldiers arrested man found at hideout. R released, other man publicly executed.
- R received threatening phone calls from man with a Kuwaiti accent. Never reported threats to Kuwaiti gov't.

Hypo #4 – Unable or Unwilling?

- R suffered rape and DV by husband for years in Guatemala. Reported abuse to police.
- Police responded multiple times but did not arrest, detain, or question husband – despite his statements that police could not intervene because R was "his property."
- In one instance, police refused to respond at all, citing insufficient personnel to come to R's aid.

Futility or Further Abuse

No need to report persecution if doing so (1) would be **futile** or (2) might subject applicant to **further abuse**.

Example: ***Vitug v. Holder***, 723 F.3d 1056 (9th Cir. 2013)

- R was a gay native of the Philippines. Beaten multiple times, did not report.
- 9C held lack of reporting excusable because R established police in Philippines known to harass gay men and "turn a blind eye to hate crimes."

Particular Social Group

BIA: 3 Elements

- Immutability
- Particularity
- Social Distinction

Examples of PSG?

- Homosexuals
- Subclan in Somalia
- Young women opposed to FGM
- Filipinos of mixed Filipino-Chinese ancestry
- Married women in Guatemala who are unable to leave their relationship

PSG: Domestic Violence

Social group as defined met the requirements of particularity and social distinction in light of country conditions evidence in the record.

Note: DHS conceded the validity of the social group as defined in its briefing before the Board.

Post *A-R-C-G-* Case Law

"Salvadoran women in intimate relationships with partners who view them as property" is not a cognizable PSG

- Not immutable – Being unable to leave is what makes DV groups immutable
- Not socially distinct

Vega-Ayala v. Lynch, 833 F.3d 34 (1st Cir. 2016)

Cases where R was not a member of proposed PSG

- *Fuentes-Erazo v. Sessions*, 848 F.3d 847 (8th Cir. 2017)
- PSG -- "Honduran women in domestic relationships who are unable to leave their relationships"
- R was able to leave/not a member of PSG

Hypo #1 – Gang-based claims

- R recruited by gang but refused to join
- Convinced brother to leave gang
- Gang threatened R
  - Beat him severely on one occassion
- PSG: "persons taking concrete steps to oppose gang membership and gang authority"

PSG established?

Hypo #1 – Answer

Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014)

- Held that the group (people opposed to gangs) was immutable
- Remanded-- the Board's decision did not adequately address social distinction of the proposed PSG.
- "[T]he BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity."

Hypo #2 – Answer

Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007)

- Held that *tattooed youths* was not sufficiently particular
- Persecution on account of shared past experiences (gang membership)-- not the type of characteristic that is protected under the asylum laws
  - Recognizing the PSG would "pervert the manifest humanitarian purpose of the statute in question."

Hypo #3 – Answer

***Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009)**

- Voluntary membership in a criminal gang is not membership in a PSG.
- *But* former gang membership or an inability to resign without facing persecution can qualify as a PSG.

  Noted there was no per se bar to asylum or withholding of removal for former gang members.

Hypo #4 – Answer

***Rios v. Lynch*, 807 F.3d. 1123 (9th Cir. 2015)**

- Religion– Evangelical faith
  - Ninth Circuit upheld Board denial– no evidence of persecution on account of their faith

Hypo 1 - Nexus

- Native of Mexico, voluntarily returned in 2011. Father rejected gang request to sell drugs
- After return, R left home when heard gunshots; saw car drive by.
- A week later, R was approached by same car. Gang asked him to sell drugs. R declined.

Hypo 1 – Nexus

- IJ found gang targeted R b/c of interest in selling drugs at store
- IJ noted P's motive related to store ownership/no nexus

Hypo 2 – Nexus?

- R worked for state-run agency in Colombia that provided medical services.
- 1998-2004: R pressured to hire certain contractors outside of official approval process. When R refused, R transferred to another division.
- R continued to voice complaints re: corruption in hiring process. R started receiving threatening phone calls. Anonymous callers threatened to kill her if R did not leave country.

Convention Against Torture

8 C.F.R. § § 208.16-208.18

Government Acquiescence

Prior to torture, government official must:

- Have **awareness** of torture, and
- **Breach** duty to stop it

"**Willful blindness**" standard

- 1st and 11th Circuits have not formally adopted standard

No Government Acquiescence when:

Purely Private Acts

- Common criminals
- Domestic abusers
- Illegal acts of corrupt businessmen

Lawless states

- No central government = no government acquiescence

No Breach of Duty to Stop Torture

R provides law enforcement with **limited information** regarding torturer

Failure to Report can undercut CAT claim

- Especially when CC evid that gov't controls torture
- **BUT** does not undercut claim when reporting would be **futile**

Who is a Public Official?

Person with political or gov't affiliations

Local versus National

- CAT requires showing that "a public official" would acquiesce, NOT entire government
- Acquiescence of local public official sufficient even if national gov't would not acquiesce

Who is a Public Official?

Actions of "rogue" officials are not considered gov't involvement/acquiescence

However, 7th and 9th Circuits generally do not agree with Board's characterization of officials as "rogue"

- They hold that there need not be a relationship between officials actions and his or her duties, and
- Official need not be furthering nation's interest

Hypo #1 – Eligible for CAT?

- Luis threaten to kill R multiple times
- CC indicate police regularly threaten victims and witnesses; perpetrators rarely punished
- Peruvian gov't efforts to curb corruption since R left Peru
- National identity database, but no evidence police release information

R eligible for CAT?

Standard of Review – BIA

CLEAR ERROR OR DE NOVO SOR?

Credibility Determinations?

Whether harm rises to the level of persecution?

Predictive Findings of what may occur in the future?

CLEAR ERROR OR DE NOVO SOR?

Whether an applicant merits asylum as a matter of discretion?

Nature of an applicant's criminal activities, family ties, employment history?

Whether an applicant's misrepresentation is material?

CLEAR ERROR OR DE NOVO SOR?

Whether persecution was *on account of* a protected ground?

The content of foreign law?

Whether a person had knowledge of something?

Using Correct Terminology

Clear Error

Correct	Incorrect
• There is no clear error in… • We hold that the IJ's factual findings are not clearly erroneous • Upon the facts as found below, with which no clear error has been shown, we agree/disagree with IJ's determination	• We agree with the IJ that R is not credible • Contrary to the IJ's findings, we find R not credible • We find **no clear error** in IJ's ACF, and **as such no reason to disturb** determination that R not met BOP • We find no reversible error in IJ's ACF

Avoid Circuit Court Review Standards

- Substantial error
- Abuse of discretion
- A reasonable adjudicator would not be compelled to determine
- Reversible error

Example #1

- ALTERNATIVE: "Upon de novo review, we agree with the IJ's determination…"

- Reason: Board has de novo review over issue of whether R has established a WFF

Example #2

- ALTERNATIVE: "The IJ's ACF was not clearly erroneous. Upon de novo review, we agree that R did not meet BOP…"

- Reason: Clarifies that clear error does not apply to questions of law or application of law to facts

Example #3

- ALTERNATIVE: "There is no clear error in the IJ's finding that it is implausible..."

- Reason: Board must defer to FF unless clearly erroneous. "Agreeing with" is not properly deferential

Learning Objectives – Part 2:

- Understand complicated aspects to bars to fear-based relief
- Firm Resettlement – exceptions to the bar/BOP/Hypos
- PSC Bar – Hypos
- Terrorist Bar -- 3 Tiers, knowledge exemption, material support

Learning Objectives – Part 2:

- Be aware of recent CC cases affecting all three forms of relief.
- *Gaye v. Lynch* (6th)
- *Reyes v. Lynch* (9th)
- *Cruz v. Sessions* (4th)
- *Bringas-Rodriquez v. Sessions* (9th)
- *Barahas-Romero v. Lynch* (9th)
- *Iruegas-Valdez v. Yates* (5th)

Asylum, Withholding and Convention Against Torture

June 1

2017

This outline is a companion to the training on asylum, withholding and Convention Against Torture provided by Charles Adkins-Blanch, Vice Chairman of the Board of Immigration Appeals, and Karen Hope, Staff Attorney at the Board of Immigration Appeals. It is also a reference guide; the authors' views expressed herein do not necessarily represent the views of the Board of Immigration Appeals, the Executive Office for Immigration Review, or the Department of Justice.

I. Background and Sources of Law

A. Sources of Law

1. **Refugee Act of 1980**

2. **Federal Circuit Court and Supreme Court decisions**

3. **BIA precedent decisions**

4. **Regulations at 8 C.F.R. §§ 1208.1 to 1208.31**

5. **UNHCR Handbook**

B. What is a "refugee?"

INA § 101(a)(42)(A) – defines a refugee as any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(B) – provides that a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.

1. The statute superseded *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989) (holding that China's one-child policy is not facially persecutory and does not create a well-founded fear of persecution on account of an enumerated ground).

2. *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008) (holding that section 101(a)(42) of the Act does not confer automatic or presumptive refugee status on a spouse of a person who has been subjected to a forced abortion or sterilization).

    a. However, a person may establish he qualifies as a refugee on account of a well-founded fear of persecution because he will be subjected to forced sterilization or will be persecuted for not undergoing such a procedure, or will be persecuted for "other resistance" to a coercive population control program.

2. Credibility determination—new "totality of the circumstances" standard—INA § 208(b)(1)(B)(iii); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).

   a. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal. INA § 208(b)(1)(B)(iii).

   b. Inconsistencies need not "go to the heart of" applicant's claim. Although any discrepancy may be considered, material inconsistencies are given more weight in the "totality of the circumstances" analysis.

   c. Circuit courts have addressed the potential application of the legal doctrine *falsus in uno, falsus in omnibus* ("false in one thing, false in everything") after the passage of the REAL ID Act. *See, e.g., Quezada-Caraballo v. Lynch*, 841 F.3d 32, 33 (1st Cir. 2016). There is a circuit split regarding whether the doctrine applies in the context of the REAL ID Act. *Compare Quezada-Caraballo v. Lynch*, *supra*, *and Enying Li v. Holder*, 738 F.3d 1160, 1163 (9th Cir. 2013) *with Kadia v. Gonzales*, 501 F.3d 817, 821-22 (7th Cir. 2007). There is a further circuit split regarding whether the Board, in addition to Immigration Judges, may also use the doctrine in making credibility determinations regarding evidence presented to the Board. *Compare Qin Weng Zheng*, 500 F.3d 143, 147 (2d Cir. 2007) *with Shouchen Yang v. Lynch*, 822 F.3d 504, 508-09 (9th Cir. 2016). For more information on the *falsus in uno, falsus in omnibus* doctrine, *see* Alexandra Fleszar, *Finding Firm Ground: Exploring the Limits of Adverse Credibility*, 11 (no. 3) Imm. L. Advisor 1 (Mar.-Apr. 2017).

3. Corroboration standard—INA § 208(b)(1)(B)(ii)

   a. IJ may request corroboration in determining if the burden of proof is sustained, even where he finds the applicant's testimony credible but unpersuasive or

the evidence. *Sibanda v. Holder*, 778 F.3d 676 (7th Cir. 2015) (holding corroboration to be unreasonable where those needed to provide it were indifferent, had been threatened not to assist, or lacked personal knowledge, and where country reports, if provided, would at most prove only that the claim was plausible).

- **Second Circuit:** "The alien bears the ultimate burden of introducing such evidence without prompting from the IJ." *Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009) (Pre-REAL ID). *But see Yan Juan Chen v. Holder,* 658 F.3d 246, 253 (2d Cir. 2011) (noting that "importantly" the IJ "identified the necessary corroborating evidence nine months in advance of [the respondent's] hearing, allowing her an opportunity to secure [the evidence] or explain why it was not available") (citing *Ming Shi Xue v. BIA*, 439 F.3d 111, 112 (2d Cir. 2006) (Pre-REAL ID)).

- **BIA follows 2d and 7th Circuits**—in *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015), the Board held that an IJ should consider an applicant's explanations for not providing corroborating evidence and, if a continuance is requested to obtain such evidence, he should determine whether there is good cause to continue proceedings; however, an IJ is not required to continue proceedings or even identify what specific evidence is necessary to meet the respondent's burden of proof. The Seventh Circuit's decision in *Darinchuluun v. Lynch*, 804 F.3d 1208, 1216 (7th Cir. 2015), cited the Board's decision in *Matter of L-A-C-*.

- **Sixth Circuit**: In an opinion issued after *Matter of L-A-C-*, *supra*, the Sixth Circuit agreed with the Seventh Circuit and disagreed with the Ninth Circuit that the Act does not entitle an alien to any notice of what sort of corroborating evidence the alien must produce to carry his burden. *See Gaye v. Lynch*, 788 F.3d 519, 528-30 (6th Cir. 2015).

Considered and Remanded to the Board: First Circuit: In *Guta-Tolossa v. Holder*, 674 F.3d 57, 64 (1st Cir. 2012), the First Circuit recognized the circuit split, but found there is a threshold issue of "whether the IJ must explicitly find an applicant's testimony 'otherwise credible' on the record, or whether such a finding may be inferred from the whole of the IJ's decision." The First Circuit remanded to the Board to resolve in the first instance. The Board remanded to the Immigration Judge for the consideration of further evidence.

8. Whether an asylum applicant could safely relocate internally. *See Zhu v. U.S. Att'y Gen.*, 703 F.3d 1301, 1311 (11th Cir. 2013); *Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008).

    a. Ninth Circuit has not determined whether internal relocation is a legal or factual question, citing conflicting Board precedent in *Matter of D-I-M-* and *Matter of A-S-B-*. *See Brezilien v. Holder*, 569 F.3d 403, 413 (9th Cir. 2009). However, *Brezilien* was issued prior to the Board's recent holding in *Matter of Z-Z-O-*, which overruled *Matter of A-S-B-*.

9. Whether a government is unable or unwilling to protect. *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2008).

10. Whether a person had knowledge of something. *See Matter of D-R-*, 25 I&N Dec. 445, 454-55 (BIA 2011) (affirming the IJ's finding that the applicant knew or should have known that captured Bosnian Muslims would face mass execution or a similar fate).

C. De Novo Review – Examples

1. Whether the level of harm constitutes "persecution."

2. Whether the applicant has an objectively reasonable fear of future persecution. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 586 (BIA 2015).

3. Whether the applicant is firmly resettled. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011).

4. Discretionary determination.

5. Whether a proposed group is a cognizable PSG. *Matter of A-R-C-G-*, 26 I&N Dec. 388, 390 (BIA 2014) (although whether an applicant is an actual member of the PSG is a finding of fact reviewed for clear error. *Id.* at 391).

6. Whether a misrepresentation is material. *Matter of Y-L-*, 24 I&N Dec. 151, 159 (BIA 2007); *see Luciana v. Attorney Gen. of U.S.*, 502 F.3d 273, 280 (3d Cir. 2007) (concluding the IJ's determination that a false statement was not material to be "erroneous as a matter of law").

harm may qualify as persecution if it is a deliberate imposition of *severe* economic disadvantage or deprivation of liberty, food, housing, employment, etc.).

3. Protected grounds—Race, religion, nationality, particular social group, and political opinion. These grounds are discussed further in the "Highlights of Caselaw" section of this outline. Note: All grounds may be imputed. *See Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011).[2]

4. Nexus requirement—Persecution must be "on account of" a protected ground.

   a. Under the REAL ID Act, the respondent must show that the protected ground is "one central reason" for the persecution. REAL ID Act of 2005, §§ 101(a)(3), 101(c).

   b. Political opinion: Persecution must be on account of the *victim's* political opinion, not the persecutor's. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

   c. The Board has held that a persecutor's motive is a matter of fact (i.e. subject to clear error review). *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

5. "Unable or unwilling to control"—Persecution must be inflicted by either a government actor or a private actor whom the government is unable or unwilling to control. *See Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985); *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980) (clarifying that a government's "difficulty" controlling a private actor does not equate to the government's inability to do so).

   a. Common examples of non-governmental actors: gangs, common criminals, militias or other non-regular forces, guerillas or other rebel groups, violent religious or sectarian organizations, particularly powerful individuals.

   b. Constructing one standard definition for the terms "unable" and "unwilling" has been challenging. *See Urbina-Dore v. Holder*, 735 F.3d 952, 954 (7th Cir. 2013) ("The Board has used the 'unwilling or unable to control' formula since 1964 yet has never attempted to quantify just how far a nation may depart from perfect law enforcement without being deemed complicit in private crimes.").

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[2] In *Lkhagvasuren v. Lynch*, 849 F.3d 800, 803 (9th Cir. 2016), the Ninth Circuit assumed without deciding that the *Matter of N-M-* framework may be applied for the purpose of identifying whether an applicant has established the requisite factual nexus between any purported political whistleblowing and actual persecution as those terms are defined in the REAL ID Act. In doing so, the Ninth Circuit held that the alien failed to establish that whistleblowing against his employer amounted to persecution.

h. Unwillingness to intervene - *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007) - The Second Circuit remanded to the Board to consider testimony that several days after alien's kidnapping by the FARC, she filed a complaint with local authorities, but they did not give her complaint "much importance" because she was "just a civilian person" and also a country conditions report that the government, "[w]ith the stated goal of furthering peace talks," had allowed the FARC "to maintain control over a Switzerland-sized area" of the country. *Id.* Need to consider evidence that the Columbian Gov't acquiesced to FARC's control over large swath of land and did not investigate her claim.

i. Nexus between a statutorily protected ground and the government's inability or unwillingness to control is not necessary. *Doe v. Holder*, 736 F.3d 871 (9th Cir. 2013). The only nexus requirement is that the actual persecutors, whether governmental or nongovernmental, act on a protected ground.

j. The arrest of an actor for acts unrelated to the persecution at issue is insufficient to demonstrate willingness to protect. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944, 952 (4th Cir. 2015).

k. Some courts have held that the alien need not report the persecution if doing so would be futile or might subject him to further abuse. *See, e.g., Vitug v. Holder*, 723 F.3d 1056, 1065 (9th Cir. 2013) (holding that the lack of reporting was excusable because the respondent established that police in the Philippines were known to harass gay men and "turn a blind eye to hate crimes"). For other examples that considered that the individual had not contacted the police, *see also Mulyani v. Holder*, 771 F.3d 190 (4th Cir. 2014) (holding that the respondent did not show government inability or unwillingness, as the respondent never notified police or other government officials, and the attackers "did not consider themselves free to assault her with impunity"); *Almutairi v. Holder*, 722 F.3d 996 (7th Cir. 2013) ("[B]ecause he never mentioned the threatening calls to anyone in the Kuwaiti police or military, he could only speculate that the Kuwaiti government might not protect him if he did seek its help."). **NOTE:** *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (overruled its prior decision in *Castro-Martinez v. Holder*, which held that for a past persecution claim in which the alien did not report the harm, R bears the burden to "fill in the gaps" regarding how the gov't would have responded).

6. Discretionary Considerations—Asylum is discretionary, unlike withholding of removal. *See* 8 C.F.R. § 1208.13(b)(1)(i). Although a respondent may satisfy the other requirements for the asylum claim, the individual must warrant a positive discretionary determination. *See e.g., Junming Li v. Holder*, 656 F.3d 898 (9th Cir. 2011) (upholding the IJ's denial of asylum in an exercise of discretion where the

B. Burden of Proving Past Persecution

1. The applicant bears the burden of proving past persecution. An IJ must make a specific finding as to whether an applicant has established "past persecution." *See Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008).

2. If past persecution is established, applicant then has a presumption of a well-founded fear. 8 C.F.R. § 1208.13(b)(1).

3. The respondent's testimony alone may be enough. 8 C.F.R. § 1208.13(a).

4. If the respondent fears harm unrelated to past persecution, then the respondent still has the burden. 8 C.F.R. § 1208.13(b)(1).

5. To rebut presumption, DHS bears the burden of proving changed circumstances or safe relocation by a preponderance of the evidence. 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

    a. The respondent must be *able* to relocate (substantially better conditions exist in another area than those that would give rise to the well-founded fear of persecution) AND relocation *must be reasonable* under the circumstances. *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012); 8 C.F.R. § 1208.13(b)(2)(ii)-(b)(3). The regulations provide a non-exhaustive list of factors, including: ongoing civil strife; administrative, economical, or judicial infrastructure; geographical limitations; social/cultural restraints such as age, gender, health; and social/familial ties.

6. If DHS rebuts the presumption, then "humanitarian" asylum can be granted in the absence of a well-founded fear of future persecution if:

    a. There are compelling reasons arising out of the severity of the past persecution. 8 C.F.R. § 1208.13(b)(1)(iii)(A); *Matter of L-S-*, 25 I&N Dec. 705, 710-12 (BIA 2012); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989);

    OR

    b. There is a reasonable possibility of "other serious harm" upon return (need not relate to a protected ground). 8 C.F.R. § 1208.13(b)(1)(iii)(B); *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012) (suggests factors to consider when looking at "other serious harm"). Other serious harm must be at least as severe as the persecution. Examples: civil strife, extreme economic deprivation, potential for new mental/physical harm to occur.

Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008) (finding a pattern or practice of persecuting gay men in Jamaica).

5. "Disfavored group" (Ninth Circuit only)—*Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009); *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). For more information, *see* Adam L. Fleming, *Organized Atrocities: Asylum Claims Based Upon a "Pattern or Practice" of Persecution*, 7 (no. 3) Imm. L. Advisor 1 (March 2013).

6. Internal relocation: In cases in which the applicant has not suffered past persecution, s/he has burden to prove that s/he cannot avoid persecution by relocating to a different part of the country or that it would be unreasonable to expect him/her to relocate. 8 C.F.R. § 1208.13(b)(2)(ii), (b)(3)(i).

   In cases in which the persecutor is a government or is government-sponsored, it is presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.13(b)(3)(ii).[4]

   The following circuit court examples cite to either 8 C.F.R. § 1208.13(b)(2)(ii), or 8 C.F.R. § 208.13(b)(2). *See e.g.*, *Khattak v. Holder*, 704 F.3d 197, 203 (1st Cir. 2013); *Ritonga v. Holder*, 633 F.3d 971, 977 (10th Cir. 2011); *Fakhry v. Mukasey*, 524 F.3d 1057, 1065 (9th Cir. 2008); *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008); *Arboleda v. U.S. Att'y Gen.*, 434 F.3d 1220, 1223 (11th Cir. 2006); *Chen v. U.S. Dep't of Justice*, 468 F.3d 109, 111-12 (2d Cir. 2006); *Mohamed v. Ashcroft*, 396 F.3d 999, 1006 (8th Cir. 2005); *Vente v. Gonzales*, 415 F.3d 296, 303 (3d Cir. 2005).

   Note: While the Board addressed internal relocation in *Matter of C-A-L-*, 21 I&N Dec. 754 (BIA 1997), circuit courts have not cited to this case on the topic since 2006.

   In cases in which an applicant has suffered past persecution, and DHS must rebut the presumption of well-founded fear of future persecution and demonstrate that the respondent could avoid future persecution by reasonably relocating to another part of his country of nationality, the Board has set forth criteria that the Attorney General and DHS must meet. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012). The factors used to assess reasonableness of relocation include, but are not limited to: whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic,

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[4] *See Singh v. Sessions*, No. 15-3552-ag, 2017 WL 1379365 (2d Cir. Apr. 14, 2017) (unpublished) (noting that the IJ's finding that alien could relocate within India to avoid persecution was erroneous because the IJ improperly placed the burden of proof on alien when his alleged persecutor was the Indian government).

4. An IJ must enter an order of removal where withholding is granted but asylum is denied. *Matter of I-S- and C-S-*, 24 I&N Dec. 432 (BIA 2008).

5. **NOTE**: A number of circuits and the Board have held prediction of future events that would support a finding of persecution to be more likely than not to occur to the applicant is fact finding and must be reviewed by the Board for "clear error."

E. Withholding and Deferral of Removal under Convention Against Torture (CAT):

If eligible, it is mandatory, but note that deferral can be temporary. *See* 8 C.F.R. §§ 1208.16-1208.18.

1. Applicant has the burden to establish that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2).

   NOTE: 7th Circuit has recently used a new standard – "substantial risk" of torture. *See Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1135-36 (7th Cir. 2015); *Gutierrez v. Lynch*, 834 F.3d 800, 804 (7th Cir. 2016).

2. Torture defined at—8 C.F.R. § 1208.18(a)(1)-(8):

   - Causes severe physical/mental pain
   - Intentionally inflicted
   - For proscribed purpose
   - By, at instigation of, or with consent/acquiescence of public official
   - Custody/physical control of victim
   - Does not arise from lawful sanctions

   a. Inadequate prison conditions not tantamount to "torture" unless can show intentionally inflicted on applicant. *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), *overruled on other grounds by Azanor v. Ashcroft*, 364 F.3d 1013, 1020 (9th Cir. 2004) (rejecting the Board's requirement that the victim be in the custody or physical control of a public official).

   b. *Kone v. Holder*, 620 F.3d 760 (7th Cir. 2010) - Threat of FGM on alien's USC daughter (against alien's will), if the daughter returned to Mali, could constitute direct persecution of aliens cognizable under the Convention Against Torture.

   c. Inadequate medical care—also must be shown to be intentionally inflicted. *Villegas v. Mukasey*, 523 F.3d 984 (9th Cir. 2008) (inadequate psychiatric care

b Gov't Actions not Satisfying Breach of Legal Duty
- Warfare against insurgent groups - *Limani v. Mukasey*, 538 F.3d 25 (1st Cir. 2008)
- Investigation, arrest, prosecution - *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001)
- Large scale effort to combat criminal entities - *Saldana v. Lynch*, 820 F.3d 970 (8th Cir. 2016)
- Nat'l gov't reconciliation efforts b/w factions - *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013)

c Generally, no breach of duty when the applicant provides law enforcement with only limited information regarding the torturer, such that law enforcement does not have enough information to solve the case. *Alvizures-Gomes v. Lynch*, 830 F.3d 49 (1st Cir. 2016)

- An applicant's failure to report incidents of past torture can undercut his or her claim that the government would acquiesce to any torture. This is especially true when country conditions evidence indicates that the government generally controls the feared torture. *Mayorga-Vidal v. Holder*, 675 F.3d 9 (1st Cir. 2012). However, similar to asylum and withholding, an applicant's failure to report past torture does not undercut a CAT claim if he or she can show that reporting the torture would have been futile. *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010)

d Gov't Actions establishing lack of Acquiescence
- *Granada-Rubio v. Lynch*, 814 F.3d 35, 37-38, 40 (1st Cir. 2016); *Ordonez–Tevalan v. Attorney Gen. of United States*, 837 F.3d 331 (3d Cir. 2016); *Lizama v. Holder*, 629 F.3d 440, 449–50 (4th Cir. 2011); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 493-94 (5th Cir. 2015); *Alhaj v. Holder*, 576 F.3d 533, 536-39 (6th Cir. 2009); *Bitsin v. Holder*, 719 F.3d 619, 631 (7th Cir. 2013); *Saldana v. Lynch*, 820 F.3d 970, 976-78 (8th Cir. 2016); *Alphonsus v. Holder*, 705 F.3d 1031, 1049 (9th Cir. 2013); *Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006); *Rodriguez Morales v. U.S. Att'y Gen.*, 488 F.3d 884, 891 (11th Cir. 2007)

e Official capacity – Color of Law - *Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014) – "an act is under color of law when it constitutes a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 891; *Iruegas-Valdez v. Yates*, 846 F.3d 806 (5th Cir. 2017); *see also Ramirez-Peyro v. Holder*, 574 F.3d 893, 895-98, 902-05 (8th Cir. 2009); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1020-21, 1024-26 (9th Cir. 2010) (The court stressed that where "a government official uses the resources of his office to extort bribes from many people, he is engaged in more than aberrational conduct.").

2014); *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 351 (5th Cir. 2006); *Sarhan v. Holder*, 658 F.3d 649, 657-58 (7th Cir. 2011); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 n.3 (8th Cir. 2009); *Reyes-Sanchez v. U.S. Att'y Gen.*, 369 F.3d 1239, 1242-43 (11th Cir. 2004); *Ramirez-Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009)

- Generally, evidence of a government's inability to control torturers is not relevant if the evidence establishes that the government is willing to control the torture. However, the 3rd, 7th, and 9th Circuits generally hold that evidence of a government's inability to control torture is always relevant. *See, e.g., Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1140 (7th Cir. 2015) (holding that success—or lack thereof—of government efforts to control torture is relevant to the likelihood of torture); *Sarhan v. Holder,* 658 F.3d 649, 657-58 (7th Cir. 2011); *Silva-Rengifo v. Att'y Gen. of U.S.*, 473 F.3d 58, 65 (3d Cir. 2007); *Zheng v. Ashcroft*, 332 F.3d 1186, 1195 n.8 (9th Cir. 2003)

h "Public Official"

- Neither the CAT regulations, 8 C.F.R. § 208.18, nor the Convention Against Torture, Art I (which § 208.18 incorporates), defines the term "public official." *Kamara v. Att'y Gen. of U.S.*, 420 F.3d 202, 215-16 (3d Cir. 2005) (remanding to the Board to address whether the Revolutionary United Front (RUF) constitutes a "public official" for purposes of 8 C.F.R. § 208.18).

- A public official has been described as an individual with political or government affiliations. *See Kasneci v. Gonzales*, 415 F.3d 202, 205 (1st Cir. 2005) (holding that the IJ found no link between the attacks against the respondent at his family-owned gas station in Albania and "the attackers' alleged political or government affiliations").

  - Compare with *Ang v. Gonzales*, 430 F.3d 50, 59 (1st Cir. 2005), finding that a disgruntled ex-employee on security detail for the U.S. Embassy in Cambodia was not considered a public official, and
  - *Tendean v. Gonzales*, 503 F.3d 8 (1st Cir. 2007) - Person who ran for (but didn't obtain) public office.

- Some examples of who is considered a public official are prison guards and police officers.

  - Prison Guards: *Roye v. Att'y Gen. of U.S.*, 693 F.3d 333 (3d Cir. 2012) (vacating the Board's decision and remanding the case where the respondent would likely be imprisoned in Jamaica due to his mental

officials are *willfully accepting* of the . . . tortuous activities.") (emphasis added); *see also Regalado-Escobar v. Holder*, 717 F.3d 724, 731 (9th Cir. 2013) (holding that the alien had "not shown that public officials were aware of the attacks by the National Liberation Front for Farabundo Marti").

Most circuits now apply the "willful blindness" standard (discussed below); *see also Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270, 283 (A.G. 2002) (finding that the relevant inquiry under the CAT is "whether governmental authorities would approve or 'willfully accept' atrocities committed against persons in the respondent's position").

- "Willful blindness" standard:

  - The Ninth Circuit first articulated this standard in *Zheng v. Ashcroft*, 332 F.3d 1186, 1188–89 (9th Cir. 2003) ("We conclude that the BIA's interpretation of acquiescence to require that government officials 'are willfully accepting' of torture to their citizens by a third party is contrary to clearly expressed congressional intent to require only 'awareness,' and not to require 'actual knowledge' or 'willful[] accept[ance]' in the definition of acquiescence."); *see also Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011) ("Acquiescence by government officials 'requires only that [they] were aware of the torture but "remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it."'" (quoting *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008)). The Second Circuit adopted this reasoning in *Khouzam v. Ashcroft*, 361 F.3d 161 (2nd Cir. 2004).

  - The Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have all since endorsed the "willful blindness" test. *See Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010); *Silva-Rengifo v. Att'y Gen. of U.S.*, 473 F.3d 58, 65 (3d Cir. 2007) (" [A]n alien can satisfy the burden established for CAT relief by producing sufficient evidence that the government in question is willfully blind to such activities."); *Khrystotodorov v. Mukasey*, 551 F.3d 775, 782 (8th Cir. 2008) ("A government's 'willful blindness toward the torture of citizens by third parties' amounts to unlawful acquiescence"); *see also Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 n. 3 (8th Cir. 2009) (same); *Mouawad v. Gonzales*, 485 F.3d 405 (8th Cir. 2007) (finding that a "government cross[es] the line into acquiescence when it shows willful blindness toward the torture of citizens by third parties"); *Tunis v. Gonzales*, 447 F.3d 547, 551 (7th Cir. 2006); *N.L.A. v. Holder*, 744 F.3d 425, 442 (7th Cir. 2014) (citing the willful blindness standard

CAT deferral differs from CAT Withholding in that:

1. Continued detention possible following grant of deferral application—8 C.F.R. § 1208.17(c).

2. IJ must give notice to alien of conditions of the deferral grant—8 C.F.R. § 1208.17(b).

3. DHS may seek termination of a deferral grant at any time by filing a motion with accompanying relevant evidence that was not present at the previous hearing—8 C.F.R. § 1208.17(d)(1).

V. Highlights of Caselaw Relating to Asylum and 241(b)(3) Withholding

A. What is "persecution"?

1. *Matter of Acosta*, 19 I&N Dec. 211, 223 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), defines persecution as: "harm or suffering . . . inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome."

2. *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)—non-physical harm may count—that is, deliberate imposition of *severe* economic disadvantage or deprivation of liberty, food, housing, employment, etc.

3. Non-physical harm: *psychological harm* may count. *See Tadesse v. Gonzales*, 492 F.3d 905, 912 (7th Cir. 2007) (considering the "lasting psychological damage" of the gang rape that the Eritrean applicant suffered and the fact that she lost all her family in the war as part of persecution analysis and remanding to the Board); *see also Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007) (distinguishing psychological harm resulting from female genital mutilation that could rise to the level of persecution from "a fear of psychological harm alone" that would not rise to the level of persecution; denying Senegalese applicant's withholding of removal based on psychological harm she would suffer if her 5-year-old daughter was forced to undergo FGM).

4. *He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014)—economic persecution requires "substantial economic deprivation that interferes with the applicant's livelihood."

   NOTE: Board chose not to follow the Ninth Circuit's lower standard of "deliberate imposition of *substantial* economic disadvantage." *See Kovac v. INS*, 407 F.2d 102,

applicant nor harmed the family member in order to target the applicant."); *Camara v. Att'y Gen. of U.S.*, 580 F.3d 196, 205 (2d Cir. 2009), *as amended* (Nov. 4, 2009) (finding that "a person who has directly witnessed a brutal assault on a family member has experienced so devastating a blow as to rise to the level of persecution.")

8. Age considerations: the First, Second, Seventh, and Ninth Circuits have explicitly held that "age can be a critical factor" in determining whether the harm a child suffers or fears may constitute persecution. *Ordonez-Quino v. Holder*, 760 F.3d 80, 91 (1st Cir. 2014); *Jorge–Tzoc v. Gonzales,* 435 F.3d 146 (2d Cir. 2006); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Hernandez–Ortiz v. Gonzales,* 496 F.3d 1042, 1045 (9th Cir. 2007). Most of the other circuits have recognized, either indirectly or in unpublished decisions, that an applicant's age may affect whether harm rises to the level of persecution.

    a. Third and Tenth Circuits: Age is an appropriate consideration. Unpublished decisions from both courts have indicated age is an appropriate factor to consider in past persecution determinations. *See Razzak v. Att'y Gen. of U.S.*, 287 F. App'x 208, 212–13 (3d Cir. 2008); *Pacaja Vicente v. Holder*, 451 F App'x 738, 743 n.6 (10th Cir. 2011).

    b. Fourth Circuit: Asylum standard is no different for adult and child applicants, but age consideration is part of the standard. *See Cruz-Diaz v. INS*, 86 F.3d 330, 331 (4th Cir. 1996) (noting the subjective and objective aspects of well-founded fear "necessarily include[] consideration of age, and citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), which states "the reference to 'fear' in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien"); *Garcia-Garcia v. INS*, 173 F.3d 850, 1999 WL 150822 (4th Cir. 1999) (unpublished).

    c. Fifth Circuit: Age is not always relevant as to whether a particular act constitutes persecution. *Paz-Caballero v. INS*, 47 F.3d 427, 1995 WL 71383 (5th Cir. 1995) (unpublished) (rejecting a petitioner's assertion that being under the legal draft age transformed his conscription into "persecution.").

    d. Sixth Circuit: Age may affect testimony. *See Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (noting that a child may be incapable of articulating his or her fear or testifying in detail about personal matters).

    e. Eighth Circuit: Age progression may rebut presumption of WFF. The Eighth Circuit has held that where a child experienced past persecution, the child's subsequent progression to adulthood may constitute a "fundamental change in circumstances" that rebuts the presumption of a well-founded fear of future

4. "Social Distinction": same as "social visibility," but a new name; group must be regarded as socially distinct segment of society; literal "visibility" of group is **NOT** determinative—*Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

5. Perceptions of the group are measured from the perspective of society, not the persecutor—*Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

6. Circuit courts have taken various approaches when considering whether particularity or social visibility/distinction applies to asylum claims. Prior to *Matter of W-G-R-* and *Matter of M-E-V-G-*, the majority of circuit courts accepted the social visibility and particularity elements. *See Matter of W-G-R-*, 26 I&N Dec. at 210-11. However, the Third Circuit has declined to afford Chevron deference to the Board's interpretation that a PSG be "particular" and "socially visible." *See Valdiviezo-Galdamez*, 663 F.3d at 608. The Seventh Circuit has rejected social visibility. *See Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). In addition, the Seventh Circuit has issued precedent contradicting the particularity requirement. *See, e.g., Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (rejecting broadness as a per se bar to protected status). After the Board issued *W-G-R-* and *M-E-V-G-*, several circuits have issued precedents discussing or favorably citing the clarified criteria in those Board decisions. *See, e.g., Paiz-Morales v. Lynch*, 795 F.3d 238 (1st Cir. 2015). However, the Seventh Circuit has issued precedent decisions continuing to treat immutability as the sole requirement without specifically discussing *W-G-R-* and *M-E-V-G-*. The Third Circuit has not issued a precedent decision on this issue since those Board decisions. The Ninth Circuit has clarified the criteria while reserving assessment of their validity. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1082-85 (9th Cir. 2014) (declining to decide whether Board's requirements of social distinction and particularity constitute a reasonable interpretation of PSG).

Examples of PSGs:

Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990) (homosexuals = PSG).

Matter of H-, 21 I&N Dec. 337 (BIA 1996) (sub-clan in Somalia = PSG).

Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) (young women not yet subjected to FGM as practiced by their tribe who oppose FGM = PSG).

Matter of V-T-S-, 21 I&N Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry = PSG).

Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016) ("former members of the Mara 18 gang in El Salvador who have renounced their gang membership" and "deportees from the United States to El Salvador" – not socially distinct and do not meet particularity requirement)

Gang-Based Asylum Claims Cases:

- Board Precedent:

  - *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008) (Honduras); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (El Salvador) (fear of gangs/resistance to gang recruitment based on personal, moral, or religious values and activities is not particular or socially visible). (Note: socially visibility is now referred to as social distinction.)

  - *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) ("former gang members who renounce their membership"—lacks particularity and social distinction; deportees also too broad to constitute PSG), *vacated in part and remanded on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (remanding a case for consideration of whether "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs" is a socially distinct group in Honduran society, emphasizing that claims need to be considered on a case-by-case basis).

- Circuit Precedent:

  - Gang Recruitment

    - General opposition to gang membership may lack particularity required to be a PSG. *See, e.g.*, *Paiz-Morales v. Lynch*, 795 F.3d 238, 244 (1st Cir. 2015); *Garcia v. Holder*, 746 F.3d 869 (8th Cir. 2014) (rejecting proposed PSG "young Guatemalan men who have opposed the MS-13, have been beaten and extorted by that gang, reported those gangs to the police, and faced increased persecution as a result" due to lack of both particularity and visibility)

      - But where threats were made on the basis of a family connection to an individual who refused to join the gang, the Fourth Circuit found a nexus to a protected ground and remanded the case for further proceedings. *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947-54 (4th Cir. 2015).

- The Board has agreed that, as a general rule in the Ninth Circuit, present or past experience in criminal activity cannot be the defining characteristic of a PSG. *See Matter of W-G-R-*, 26 I&N Dec. 208, 215 n. 5 (BIA 2014). The Board, however, did not stand for a blanket conclusion that all former gang members could not qualify for PSG asylum.

- The Seventh Circuit has held that, while current gang members are not members of a PSG for purposes of withholding of removal, *former* gang members may be since they share an immutable characteristic of past membership in the gang. *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009). The Seventh Circuit noted that there was no per se bar to asylum or withholding of removal for former gang members.

- Although the Fourth and Sixth Circuits have agreed with the Seventh Circuit on whether former gang membership is an immutable characteristic, the First Circuit has disagreed with that determination. *Compare Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014) (determining that alien's membership in group consisting of former members of gang in El Salvador was an immutable characteristic) *and Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) *with Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013) (declining to follow the Sixth and Seventh Circuits in reversing the Board's interpretation based on policy grounds and noting that sharing an immutable characteristic is a necessary but not sufficient condition to qualify as PSG). These aforementioned cases were all decided prior to the Board's issuance of *W-G-R-* and *M-E-V-G-*. Neither the Fourth nor the Seventh Circuit applied *Chevron* deference and both circuits' decisions were based largely on immutability or policy reasons.

- Other circuit courts have accorded *Chevron* deference to what they consider to be the Board's determination that former gang members do not constitute a PSG. *See Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399 (11th Cir. 2016) (noting that Board's determination that "former Mara-18 gang members" is not sufficiently particular based on *Matter of W-G-R-* and that former gang membership was not cognizable PSG based on *Matter of E-A-G-* was not unreasonable); *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016) (noting that the Board's construction of "particularity"

Holder, 768 F.3d 226, 237 (2d Cir. 2014) (citing *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007)); *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005).[5]

- Mixed motive, Family-based Claims: *Cordova v. Holder*, 759 F.3d 332, 334-39 (4th Cir. 2014) (finding that the Board had not properly considered the alien's evidence that threats he received were motivated by retaliation for his cousin and uncle's membership in a rival gang, and concluding that the recruitment motivation underlying the alien's persecution did not preclude the existence of another central reason—family ties—for that persecution); *Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017) (applying *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015) and determining that alien's PSG of nuclear family ties to husband who she suspected was murdered by his employer with organized crime ties was one central reason for persecution); *cf. Cambara-Cambara v.* Lynch, 837 F.3d 822, 825-26 (8th Cir. 2016) (noting that the applicants "provided no proof that the criminal gangs targeted members of the family because of family relationships, as opposed to the fact that, as prosperous businessmen, they were obvious targets for extortionate demands"); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 493 (5th Cir. 2015) (concluding that "the evidence that gang members sought information from [the applicant] about her brother, without more, does not support her claim that the gang intended to persecute her on account of her family").

- In *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), the Board determined that (1) whether a particular social group based on family membership is cognizable depends on the nature and degree of the relationships involved and how those relationships are regarded by the society in question; and 2) to establish eligibility for asylum on the basis of membership in a particular social group composed of family members, an applicant must not only demonstrate that he or

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[5] In February 2016, the Eighth Circuit rejected the following groups: (1) "male, gang-aged family members of murdered gang members" and (2) "male, gang-aged family members of [the alien's] cousin." *See Aguinada-Lopez v. Lynch*, 814 F.3d 924, 926-27 (8th Cir. 2016), *vacated and superseded by Aguinada-Lopez v. Lynch*, 825 F.3d 407 (8th Cir. 2016). However, the Eighth Circuit subsequently vacated its prior opinion and substituted its opinion in *Aguinada-Lopez v. Lynch*, 825 F.3d 407 (8th Cir. 2016). Citing *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005), the Eighth Circuit assumed that the respondent's proposed social groups were cognizable and affirmed the Board's determination for failure to establish nexus. *Id.* at 409.

- Rarely have courts found that informants against gangs = PSG.

- Tattoos - *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (finding that *tattooed youths* was not sufficiently particular to constitute a PSG).

VI. Bars and Exceptions to Asylum and Withholding

A. Bars to Asylum

1. One-year time limit —INA § 208(a)(2)(B) – Applicant must show by clear and convincing evidence that he applied for asylum within year of his "last arrival" (which may be contested),[6] 8 C.F.R. § 1208.4(a)(2)(ii), or establish an exception:

   a Changed circumstances—in home country or based on activities in the U.S.

   Note: It is important to distinguish between changed circumstances (including changed personal circumstances) that may be sufficient to overcome the one-year bar and changed country conditions sufficient to support a motion to reopen to apply or reapply for asylum and withholding of removal. *Compare* 8 C.F.R. § 1208.4(a)(4) *with* 8 C.F.R. § 1003.2(c)(3)(ii); *see also Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007); *Yuen Jin v. Mukasey*, 538 F. 3d 143 (2d Cir. 2008).

   However, there is an interplay between changed personal circumstances and changed country conditions in the motions context: Courts have held that when considering an untimely motion to reopen, the Board must consider changed country conditions as they relate to a change in the alien's personal circumstances (if the alien shows that the change in personal circumstances is now relevant to a claim of persecution because of a change in country conditions, then the untimely motion to reopen can be granted). *See, e.g., Shu Han Liu v. Holder*, 718 F.3d 706, 709-13 (7th Cir. 2013) (where the court found that the Board had erred in not properly analyzing the documentary evidence, which it concluded did establish changed country conditions – China had become more strict about religion – along with the respondent's conversion to Christianity while living in the US (which amounted to a change in personal

[6] *See Linares-Urrutia v. Sessions*, 850 F.3d 477 (2d Cir. 2017) (stating that in light of *Brand X, Matter of F-P-R-*, 24 I&N Dec. 681 (BIA 2008), trumps the Second Circuit's case *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006), as to the definition of "last arrival" and noting that the meaning of "arrival" and "last arrival" would benefit from clarification by Congress). The Board had rejected the Second Circuit's holding in *Joaquin-Porras* and had held that the term "last arrival" should be given its "natural and literal meaning, i.e., the alien's most recent arrival in the United States from a trip abroad." *Matter of F-P-R-, supra*, at 683-84.

- The Federal courts of appeals that have addressed firm resettlement have adopted two approaches: the Second and Fourth Circuits have adopted the "direct offer" approach, and the Third, Seventh, and Ninth Circuits have adopted the "totality of the circumstances" approach. *Matter of A-G-G-*, supra, at 495. The "direct offer" approach requires that DHS present direct or circumstantial evidence that R received an offer of some type of permanent residence from the government of a third country. *See Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir 2006); *Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004); *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2011). The "totality of the circumstances" approach considers evidence of a direct offer of firm resettlement as only one factor to be considered with other, non-offer-based, "indirect evidence." *Matter of A-G-G-, supra*, at 495-96 (citing *Sail v. Gonzales*, 437 F.3d 229 (2d Cir. 2006); *Mussie v. U.S. INS*, 172 F.3d 329 (4th Cir. 1999)). The remaining circuits have not adopted an explicit approach as to firm resettlement. However, both approaches place the initial burden on DHS, both allow for direct and indirect evidence of an offer, and both allow for consideration of evidence submitted by R to rebut DHS's evidence. *Matter of A-G-G-, supra*, at 495-96. The burden-shifting framework laid out in *Matter of A-G-G-, supra*, is consistent with both approaches.

– Asylum applicant can rebut evidence of firm resettlement offer by showing by preponderance of evidence that offer has not been made or that the

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decision, that the Board consider on remand whether "safe haven" is still a viable discretionary factor in light of the repeal of this regulation. *Shantu v. Lynch*, 654 F. App'x 608.

The earlier of the two regulations, former 8 C.F.R. § 208.14(e), which was in force from January 4, 1995 until April 1, 1997, stated that

> [a]n application from an alien may be denied in the discretion of the Attorney General if the alien can and will be deported or returned to a country through which the alien traveled en route to the United States and in which the alien would not face harm or persecution and would have access to a full and fair procedure for determining his or her asylum claim in accordance with a bilateral or multilateral arrangement with the United States governing such matter.

However, this earlier regulation had no practical effect because there were no such bilateral or multilateral agreements. *See* 59 Fed. Reg. 62284, 62296 (Dec. 5, 1994); *Tandia*, 437 F.3d at 246 n.2.

The latter of the two regulations, former 8 C.F.R. § 208.13(d), was in force from April 1, 1997, until it was repealed on January 5, 2001. *See* 65 Fed. Reg. 76121 (Dec. 6, 2000). It provided that "an asylum application may be denied in the discretion of the Attorney General if the alien can be removed to a third country which has offered resettlement and in which the alien would not face harm or persecution," thus removing the requirement for a bilateral or multilateral agreement. *See* 62 Fed. Reg. 10312, 10342 (Mar. 6, 1997); *Tandia*, 437 F.3d at 247.

or Canada), unless they qualify for an exception under 8 C.F.R. § 208.30(e)(6)(i)-(iii).

4. Frivolous Asylum Claims—INA § 208(d)(6); 8 C.F.R. § 1208.3(c)(5)

   a. Notice required of consequences of knowingly filing a frivolous application for asylum under section 208(d)(6) of the Act—INA § 208(d)(4)(A).

   b. *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007) (before making a "frivolous" finding, an IJ must provide alien with an opportunity to explain deliberately fabricated information in asylum request).

   c. Frivolous finding does not preclude applicant from seeking withholding of removal—8 C.F.R. § 1208.20.

   d. *Matter of M-S-B-*, 26 I&N Dec. 872 (BIA 2016) (holding that a time-barred asylum application may be deemed frivolous pursuant to section 208(d)(6) of the Act where the applicant deliberately misrepresents his or her date of entry when it is material to the threshold question of the timeliness of the application).

   e. Circuit courts generally require evidence of deliberate fabrication to uphold finding of frivolousness. *See, e.g., Siddique v. Mukasey*, 547 F.3d 814, 815 (7th Cir. 2008) (petitioner confessed that he had lied about police murdering his family by forging police and autopsy reports); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (medical records submitted by the alien were identified by the hospital as fraudulent); *Selami v. Gonzales*, 423 F.3d 621, 626–27 (6th Cir. 2005) (documents provided by the alien were clear forgeries when compared to true copies of the originals); *Barreto–Claro v. U.S. Atty. Gen.*, 275 F.3d 1334, 1339 (11th Cir. 2001) (alien admittedly lied in his prior asylum application).

   f. An adverse credibility determination based on discrepancies between alien's account and documentary evidence alone is insufficient to support a frivolous finding. *Wang v. Lynch*, 845 F.3d 299, 303 (7th Cir. 2017).

5. Previous Asylum Application – INA §§ 208(a)(2)(C)-(D)

   a. Where applicant previously applied for and was denied asylum, unless changed circumstances exist which materially affect his/her eligibility for asylum.

   b. Once there is a final order, applicant can only file a motion to reopen, and only under the "changed country conditions" if beyond 90-day MTR deadline.

b. Drug-trafficking aggravated felony is presumed "particularly serious"—*Matter of Y-L-, A-G- and R-S-R-*, 23 I&N Dec. 270 (A.G. 2002).
   - Narrow exception discussed in A.G.'s decision
   - **NOTE:** This presumption only applies to drug trafficking *aggravated felonies*. If an alien is convicted for a drug trafficking crime that does not constitute an aggravated felony, the presumption would not apply.

c. If a conviction is not per se a PSC, adjudicators should consider the *Frentescu* factors[8]:
   - Nature of the offense – i.e. do the element of the offense make it a potential PSC
   - Type of sentence imposed
   - Circumstances and underlying facts of the conviction.

   NOTE: The Ninth Circuit still treats *Frentescu* as defining the "applicable legal standard" in PSC cases not governed by the aggravated-felony-plus-5-year-sentence or *Matter of Y-L-, A-G- and R-S-R-* presumptions. *See Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015). In circuits other than the Ninth Circuit, you may cite to *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), for the PSC factors.

   Once elements of offense bring it within ambit of a PSC (potentially), then all reliable info may be considered (including, but not limited to record of conviction and sentencing info)—*Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).

d. *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007), recognized that in some instances, the Board may find some crimes to be PSC by looking only at the elements of the offense. **HOWEVER**, the Ninth Circuit has rejected this. *See Blandino-Medina v. Holder*, 712 F.3d 1338, 1348 (9th Cir. 2013) (holding that the Board erred in holding that lewd and lascivious acts with a child under 14 years old in violation of Ca. Penal Code § 288(a) is a PSC *per se*).

e. An alien's mental health as a factor in a criminal act falls within the province of the criminal courts and is **NOT** considered in assessing whether the alien was convicted of a "PSC" for immigration purposes. *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014).

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[8] *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), originally articulated these factors, plus the additional factor of danger to the community, which Board case law later determined was not a separate determination: instead, anyone convicted a PSC is considered a danger to the community. *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986).

2. 3 Tiers of Terrorist Organizations – defined at INA § 212(a)(3)(B)(vi)

   a. Tier I – Foreign Terrorist Organization ("FTO") – designated under INA § 219; e.g., ISIL, Al-Qua'ida, Al-Shabaab, Boko Haram

   b. Tier II – Terrorist Exclusion List ("TEL") organization – designated by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security; e.g., Revolutionary United Front, Lord's Resistance Army

   c. Tier III – defined as a "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (IV)"; no formal list; e.g., Jammu Kashmir Liberation Front, Oromo Liberation Front, and Eritrean People's Liberation Front;
   For more information as to the tiers of terrorist organizations, *see* Denise Bell, *Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Designation*, 10 (no. 5) Imm. L. Advisor 1 (June 2016).

3. Who has the burden of proof?

   a. DHS bears the initial burden of proof of showing that the "evidence indicates" that the terrorist bar "may apply." 8 C.F.R. § 1240.8(d); *see Matter of S-K-*, 23 I&N Dec. 936, 939 (BIA 2006); *Budiono v. Lynch*, 837 F.3d 1042, 1047-49 (9th Cir. 2016); *Viegas v. Holder*, 699 F.3d 798, 801-02 (4th Cir. 2012).

   b. If DHS meets its burden, then the alien has the burden of showing by a preponderance of the evidence that the terrorist bar does not apply. 8 C.F.R. § 1240.8(d).

4. Knowledge exemption (applies only to Tier III organization) – R can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization. *FH-T v. Holder*, 723 F.3d 833, 839 (7th Cir. 2013).

5. "Material support" issue from § 212(a)(3)(B)(iv)(VI) arises: Individual who lends "material support" to terrorist organization is barred from asylum and withholding; what qualifies as material support can be minimal (e.g., $1100 over a 11-month period, *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006); *see also Jabateh v. Lynch*, 845 F.3d 322 (7th Cir. 2017) (affirming the BIA's determination that the alien's provision of sporadic and infrequent interpreter services to a terrorist organization member with regard to medical appointments and social errands, i.e.,

Factors that make similarities more significant may include:
1. A large number of similarities;
2. Identical elements; and
3. Inclusion of additional non-essential material in both statements.

Possible explanations for similarities may include:
1. Mere coincidence;
2. Use of standardized templates;
3. Use of the same translator/transcriber; or
4. R was an innocent victim of plagiarism by another person.

In *Matter of R-K-K-*, the Board specifically noted that considering similar statements from different proceedings must be done in a manner consistent with the confidentiality concerns set out at 8 C.F.R. § 1208.6, which provides that information from asylum applications or credible fear/reasonable fear determinations shall not be disclosed without the written consent of the applicant, except as permitted by the regulations or as directed by the Attorney General. *See Matter of R-K-K-, supra*, at 661-63, nn. 3-4. In that case, the Board found that the confidentiality requirements had been met because R's brother waived the confidentiality protections at 8 C.F.R. § 1208.6. *Id.* at 663, n. 4. The Board also stated that it declined to address what procedural protections would be required if similar documents from different proceedings were compared absent a confidentiality waiver. *Id.* For more information on document similarities, *see* Roberta Oluwaseun Roberts, *Tackling Fraud Without Trampling Due Process: A Procedural Framework for Considering Document Similarities in Immigration* Proceedings, 11 (no. 2) Imm. L. Advisor 1 (Feb. 2017).

B. Mental Competency and Credibility: When R cannot participate in the proceedings because of a lack of competency, the question becomes whether sufficient relevant information can otherwise be obtained to allow challenges to removability and claims for relief to be presented in the absence of reliable testimony from R. *Matter of M-J-K-*, 26 I&N Dec. 773, 776 (BIA 2016). Additionally, the focus should be on on the objective component of the applicant's claim, not his or her subjective fear of harm. *See Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015) (noting that "[these] scenarios need to be assessed on a case-by-case basis, but where a mental health concern may be affecting the reliability of the applicant's testimony, the [IJ] should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim"). The Board reviews de novo the IJ's determination re which safeguards to implement. *See Matter of M-J-K-*, 26 I&N Dec. at 775.

whether these reports, which are often short on details, are prepared for the purpose of litigation, and do not contain the identity of the prepare, are admissible as evidence against an asylum seeker. The Third, Fourth, Sixth, and Eighth Circuits have found the reports are inadmissible because they violate an alien's right to due process.

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